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Petitioner,

2:16-cv-01176-JCM-CWH

ORDER

Respondents.

Background

The last original or intervening amended or corrected judgment of conviction filed in the state district court was filed on February 6, 2014. (ECF No. 17-10; exhibit 10.)

Petitioner did not file a direct appeal from any original or intervening judgment of conviction in the state district court.

On December 15, 2014, petitioner filed a state post-conviction petition. (ECF No. 17-12; exhibit 12.) On February 9, 2015, the state moved to dismiss the petition, as, *inter alia*, untimely on the basis that the petition was filed more than a year after the expiration of the time to file a direct appeal after an original judgment of conviction filed on September 25, 2013. (ECF No. 17-13, at 3-4; exhibit 13.)¹ On April 27, 2015, the state district court issued a decision via written minute entry holding that the petition was, *inter alia*, untimely. (ECF No. 17-17; exhibit 17.) On May 21, 2015, petitioner filed a written notice of appeal from the April 27, 2015, decision. (ECF No. 17-18; exhibit 18.) On June 5, 2015, the state district court issued written findings, conclusions, and an order denying the petition as, *inter alia*, as untimely on the basis argued by the state. (ECF No. 17-19, at 4; exhibit 19.) On October 19, 2015, the state supreme court affirmed also on the basis that the petition was untimely. (ECF No. 17-20; exhibit 20.) The remittitur issued on January 19, 2016. (ECF No. 17-22; exhibit 22.)

On or about May 21, 2016, petitioner mailed the federal petition in this matter to the clerk of this court for filing. (ECF No. 1-1, at 10.)²

Discussion

Timeliness

The federal one-year limitation period did not begin running as to this case under 28 U.S.C. § 2244(d)(1)(A) until after the time period expired to file a direct appeal from the February 6, 2014, amended judgment of conviction. *Smith v. Williams*, F.3d , 2017

¹All page citations herein are to the CM/ECF generated electronic document page number in the page header, not to any page number in the original transcript or document, unless noted otherwise.

²Petitioner remained in physical custody on the sentences in this case at that time, and his sentences did not expire until December 31, 2016. (See ECF No. 16, at 4, and supporting exhibit.) Duda thus clearly was in custody for purposes of federal habeas jurisdiction; and the subsequent expiration of the sentences, which in any event also ran concurrent with sentences in another case, did not render the petition moot. See, e.g., *Maleng v. Cook*, 490 U.S. 488, 490-92 (1989). The court thus would have no occasion to also consider the potential impact of the particular registration requirement imposed on the jurisdictional issue of custody.

1 WL 3927193, No. 15-16967 (9th Cir., Sept. 8, 2017). The federal limitation period therefore
2 did not begin running until after Monday, March 10, 2014. Accordingly, absent a basis for
3 delayed accrual or tolling, the limitation period expired one year later on March 10, 2015.

4 Petitioner's state post-conviction petition did not constitute a "properly filed" state
5 petition for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2) because the state courts
6 held that it was untimely filed. *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). Petitioner
7 contends – in arguing separate procedural default issues – that the state courts incorrectly
8 held that the state petition was untimely under Nevada state law. However, the state supreme
9 court's holding that the state petition was untimely under Nevada state law is "the end of the
10 matter for purposes of § 2244(d)(2)." *Allen v. Siebert*, 552 U.S. 3, 4 (2007); *Pace*, 544 U.S.
11 at 413-14. Federal decisions such as *Magwood v. Patterson*, 561 U.S. 320 (2010), and
12 *Smith, supra*, addressing federal procedural law issues do not govern the state courts'
13 resolution of the state law issues. The *Allen* and *Pace* federal decisions instead state the
14 apposite governing rule, which is that the state courts' state law determination is controlling
15 with regard to the application of statutory tolling under § 2244(d)(2). In this regard, the state
16 supreme court is the final arbiter of Nevada state law.

17 Absent statutory tolling under § 2244(d)(2), the limitation period expired on March 10,
18 2015, unless petitioner can establish a basis for either equitable tolling or delayed accrual.

19 Petitioner presents no legal argument and also no supporting factual specifics
20 presenting a potentially viable basis for equitable tolling.³ The court notes in this regard that
21 the state challenged the timeliness of the state petition and the state district court denied relief
22 based upon, *inter alia*, untimeliness more than one year prior to the constructive filing of the
23

24 ³Equitable tolling is appropriate only if the petitioner can show: (1) that he has been pursuing his
25 rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.
26 *Holland v. Florida*, 560 U.S. 631, 649 (2010). Equitable tolling is "unavailable in most cases," *Miles v. Prunty*,
27 187 F.3d 1104, 1107 (9th Cir.1999), and "the threshold necessary to trigger equitable tolling is very high, lest
28 the exceptions swallow the rule," *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir.2002)(quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.2000)). The petitioner ultimately has the burden of proof on
this "extraordinary exclusion." 292 F.3d at 1065. He accordingly must demonstrate a causal relationship
between the extraordinary circumstance and the lateness of his filing. *E.g.*, *Spitsyn v. Moore*, 345 F.3d 796,
799 (9th Cir. 2003). *Accord Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1061 (9th Cir. 2007).

1 federal petition. Petitioner's filing and pursuit of his state petition further reflects his capability
2 to seek judicial relief more than a year prior to the constructive filing of the federal petition.⁴

3 Petitioner further presents no legal argument and no supporting factual specifics
4 presenting a potentially viable basis for delayed accrual that would result in the limitation
5 period beginning to run on a later date as to any claim in the original petition.⁵

6 The federal limitation period therefore expired on March 10, 2015. The federal petition
7 was not constructively filed until more than one year later, until on or about May 21, 2016.
8 The original federal petition therefore is subject to dismissal with prejudice as untimely.

9 ***Remaining Matters***

10 On or about November 9, 2016, petitioner filed a conclusory one-page motion to
11 amend or supplement his claims. (ECF No. 8.)

12 On November 22, 2016, the court denied the motion without prejudice because
13 petitioner had not submitted a proposed pleading with the motion, providing an opportunity
14 to file a motion with a proposed pleading. The court informed petitioner, *inter alia*, that: (1)
15 piecemeal pleadings were not permitted and petitioner thus must present all claims, old and
16 new, in the proposed pleading; and (2) any claims or allegations omitted from the proposed
17 pleading and not re-alleged therein no longer would be before the court. (ECF No. 9.)

18
19 ⁴Petitioner maintained in the state courts, in arguing that the state petition was timely, that he sought
20 relief within a reasonable time after allegedly learning that no direct appeal had been filed. Duda alleged,
21 however, that once he learned that an appeal had not been filed "at that point" he requested counsel's
22 withdrawal and production of records. (ECF No. 17-15, at 3; exhibit 15.) Duda filed a state court motion for
23 discharge of counsel on August 27, 2014. (ECF No. 17-11; exhibit 11.) The state district court accordingly
24 found that he learned that counsel had not filed an appeal no later than August 27, 2014. (ECF No. 17-19, at
25 4 n.2; exhibit 19.) Petitioner thus clearly learned that counsel had not filed an appeal considerably more than
a year prior to the filing of the federal petition, and he makes no argument that counsel's failure to file an
appeal or the alleged delay in his learning that she had failed to do so provides a basis for tolling of the
federal limitation period. *See also Randle v. Crawford*, 604 F.3d 1047, 1057-58 (9th Cir. 2010)(counsel's
failure to file a direct appeal had little or no bearing on the petitioner's ability to file a timely federal petition).

26 ⁵The core factual allegations asserted in support of the claims in the federal petition either were
27 explicitly alleged in petitioner's state petition more than a year prior to the constructive filing of the federal
28 petition or otherwise pertained to matters that could have been learned through reasonable diligence more
than a year prior to the filing of the federal petition. *See, e.g., Hasan v. Galaza*, 254 F.3d 1150, 1154 n. 3 (9th
Cir. 2001)(federal limitation period begins to run under § 2244(d)(1)(D) when a petitioner could learn through
reasonable diligence the important facts, not when he recognizes their legal significance).

1 On or about December 27, 2016, petitioner filed a motion to supplement petition along
2 with a proposed supplemental pleading. The court's prior admonitions regarding piecemeal
3 pleadings notwithstanding, the proposed pleading did not carry forward any of the claims in
4 the original petition. (ECF Nos. 10 & 10-1.)⁶

5 The original petition was untimely, and there therefore are no timely claims in that
6 pleading to which the new claims in the proposed pleading can relate back for purposes of
7 timeliness under Rule 15(c) of the Federal Rules of Civil Procedure.

8 The claims therefore must stand on their own as to their timeliness or untimeliness,
9 with respect to the December 27, 2016, constructive filing date of the motion to supplement.
10 In this regard, the motion conclusorily asserts that it seeks "to add additional claims and
11 evidence which was recently received, which was referenced in the Supreme Court." (ECF
12 No. 10.) And the proposed pleading states in response to an exhaustion inquiry: "New rulings
13 on state law not previously available." (ECF No. 10-1, at 1.) However, when the court
14 reviews the claims presented in the proposed pleading, they would appear to be claims as
15 to which the factual predicate for the claims could have been discovered through the exercise
16 of reasonable diligence well more than a year prior to December 27, 2016.⁷ Moreover, the
17 attachments reflect that defense counsel provided petitioner the defense file under a
18 September 22, 2014, cover letter. (ECF No. 10-1, at 17.) Furthermore, a new state court
19 decision on a state law issue from another case cannot constitute the "factual predicate" of
20 a claim for purposes of delayed accrual under § 2244(d)(1)(D). *E.g., Shannon v. Newland*,
21 410 F.3d 1083, 1088-89 (9th Cir. 2005); *see also Hasan, supra*.

22 A substantial question thus exists as to whether the new claims are, *inter alia*, timely.
23

24 ⁶The motion states that it seeks to "add additional claims . . . [a]nd to dilate claims in original Habeas
25 Corpus," apparently reflecting petitioner's intent to delete the original claims and to seek to proceed forward
26 only on the newly alleged claims.

27 ⁷That is not to say that the claims are not potentially subject to additional substantial deficiencies.
28 The Fourth Amendment claim in new Ground 1, for example, would appear to be barred under *Stone v. Powell*, 428 U.S. 465 (1976), given that Nevada state law provides a legal avenue by which such claims can be raised before trial.

1 The parties have not had an opportunity to address the timeliness of the new claims
2 separate and apart from the claims in the untimely original petition, however. Such
3 arguments were not pursued on the motion for leave as a basis for arguing that grant of leave
4 would be futile.⁸ The court will grant petitioner leave to file the proposed pleading; and, in the
5 exercise of initial screening review of the supplemental pleading, the court will grant petitioner
6 an opportunity to show cause why the claims in the supplemental petition should not be
7 dismissed with prejudice as untimely.⁹

8 IT THEREFORE IS ORDERED that respondents' motion (ECF No. 16) to dismiss is
9 GRANTED and that the original petition is DISMISSED with prejudice as untimely.¹⁰

10 IT FURTHER IS ORDERED that respondents' unopposed motion (ECF No. 15) to
11 extend the time to file the motion to dismiss is granted *nunc pro tunc*.

12 IT FURTHER IS ORDERED that petitioner's pending motions (ECF Nos. 10, 11 and
13 12) all are GRANTED to the extent and only to the extent that the court grants petitioner leave
14 to file the proposed pleading (ECF No. 10-1) as a superceding pleading presenting only the
15 claims alleged therein with any and all prior claims no longer being before the court as per its
16 prior order (ECF No. 9).

17
18 ⁸Respondents contend that petitioner did not comply with the court's prior order regarding piecemeal
19 pleadings and thus did not file a proper motion to amend the pleadings. If petitioner instead desired – after
20 the court's express admonishment – to submit a proposed pleading presenting only new claims, that was his
21 prerogative as the master of his claims. The consequence of that decision under the court's prior order was
22 that only the claims in the new proposed pleading would remain before the court, and the claims in the prior
23 pleading all are untimely in any event. The question that remains is whether the new claims are viable given,
24 *inter alia*, the putative expiration of the federal limitation period well before December 27, 2016, and the
25 absence of any relation back.

26 ⁹Governing law regarding the calculation of the federal limitation period, statutory tolling, equitable
27 tolling, and delayed accrual is set forth within this order. Petitioner further is informed that additional statutory
28 bases for delayed accrual are set forth in subparagraphs (B) and (C) of § 2244(d)(1). Moreover, if petitioner
seeks to avoid application of the one-year limitation period based upon a claim of actual innocence, he must
come forward with new reliable evidence tending to establish actual factual innocence, *i.e.*, tending to show
that no juror acting reasonably would have found him guilty beyond a reasonable doubt, potentially as to all
charges pending against him prior to his plea. See *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013); *House v.*
Bell, 547 U.S. 518 (2006); *Bousley v. United States*, 523 U.S. 614 (1998); *Lee v. Lampert*, 653 F.3d 929 (9th
Cir. 2011)(*en banc*).

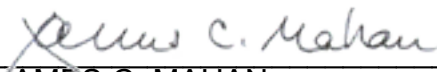
¹⁰Given the remaining dispositions herein, the court is not directing the clerk to enter final judgment.
The current order thus is not intended to constitute, and does not constitute, a final appealable order.

1 IT FURTHER IS ORDERED, that within **thirty (30) days** of entry of this order,
2 petitioner shall show cause in writing why all claims in the supplemental petition should not
3 be dismissed with prejudice as time-barred. If petitioner does not timely respond to this order,
4 the claims will be dismissed with prejudice without further advance notice. If petitioner
5 responds but fails to show with specific, detailed and competent evidence that the claims are
6 timely, the claims will be dismissed with prejudice. If all such claims are dismissed, final
7 judgment also will be entered dismissing this action with prejudice.¹¹

8 IT FURTHER IS ORDERED that all assertions of fact made by petitioner in response
9 to this show-cause order must be detailed, must be specific as to time and place, and must
10 be supported by competent evidence. The court will not consider any assertions of fact that
11 are not specific as to time and place, that are not made pursuant to a declaration under
12 penalty of perjury based upon personal knowledge, and/or that are not supported by
13 competent evidence filed by petitioner in the federal record. Petitioner must attach copies of
14 all materials upon which he bases his argument that the petition should not be dismissed as
15 untimely. Unsupported assertions of fact will be disregarded.

16 IT FURTHER IS ORDERED that, if petitioner files a response to the show-cause order,
17 respondents may file an opposition or other response thereto within **thirty (30) days** of
18 service of the response. If, and only if, respondents file a response, petitioner may file a reply
19 within **thirty (30) days** of service of the response.

20 DATED: September 29, 2017.

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24 JAMES C. MAHAN
United States District Judge
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27
28 ¹¹The filing of the supplemental petition does not signify that the petition necessarily is free of other
deficiencies. The court is reviewing the timeliness of the supplemental petition in the first instance.